

DAVID MELVILL, ADMINISTRATOR OF BENJAMIN FRY,  
DECEASED.

MAY 25, 1842.

Read, and laid upon the table.

Mr. MAXWELL, from the Committee on the Judiciary, submitted the following

REPORT :

*The Committee on the Judiciary, to whom was referred the petition of David Melvill, administrator of Benjamin Fry, deceased, report :*

The petition of Benjamin Fry, originally presented in 1836, states in substance that, shortly before the late war, the appointment of agent of fortifications for the harbor of Newport, R. I., was conferred upon him by the then Secretary of War, Mr. Eustis ; that he discharged the duties of the office for about four years, devoting to them his whole time and undivided attention, and disbursing vast sums of money on account of the United States. After serving more than one year, he, not being satisfied with the compensation proposed to be allowed, refused to act any longer, until he received a letter from the Secretary, promising that when the works were completed he should be allowed a reasonable compensation. After the works were done, a difference arose between him and the accounting officers of the Treasury Department in the settlement of his accounts and compensation ; and he submitted to a suit by the United States, in which, after a full investigation and full charge by the judge, the jury returned by their verdict that he owed the United States nothing, and by their certificate, taken as part of their verdict, that the United States were indebted to him in a sum little short of \$3,000. Being subsequently sued by the United States, as surety for his son, Henry Fry, a purser in the navy, he submitted to a judgment with an understanding that he should have a stay of proceedings until he could present his claim against the United States in such way that it could operate as a set-off. The petition concludes with asking the passage of an act authorizing his claim to be settled upon principles of equity and justice, and the amount found due him to be allowed as a set-off, and offering to submit his papers, &c., to examination. A bill authorizing such settlement was reported by the Committee on the Judiciary in 1836, and again in 1838 and in 1840, and has twice passed the House.

Benjamin Fry having since died, the petition is now presented by his administrator, David Melvill.

The following facts appear from an examination of the petition and the accompanying papers, and of a statement furnished for the use of the committee by the Third Auditor :

A letter, dated March 2, 1810, was written by William Eustis, then Secretary of War, to Benjamin Fry, stating that it was in contemplation to repair and finish certain fortifications at Newport, R. I., and that, as it was desirable that some gentleman resident in the town, acquainted with the best manner of commanding the necessary materials and such workmanship as the troops might not be able to supply, and of character entitled to the public confidence, should be employed to make the necessary purchases and disbursements, he requested Mr. Fry to undertake the business, for which a reasonable compensation should be allowed.

The agency was accepted by Mr. Fry, and two advances of funds, of \$5,000 each, were made to him—one on March 26, 1810, and the other on October 31, 1810. His accounts and vouchers were sent in to the War Department in the latter part of May, 1811, accompanied with a letter, the concluding part of which is as follows: "Having never been informed what compensation was to be allowed me for my services as agent for the United States, I have thought proper to charge 5 per cent., considering it necessary to state some commission at the foot of the account current, and learning from Captain Lloyd Beall, who had hitherto acted as agent, that 5 per cent. was allowed him, although I do not think it sufficient compensation from the small amount of money expended in such length of time, and from the consideration of the retail manner in which the purchases have been made, as the accounts will evince. Resting that point for your decision, sir, I have the honor," &c.

His accounts were settled in the office of the accountant of the War Department on the 7th June, 1811, when he received credit for purchases and expenditures amounting to - - - \$10,314 14

And for a commission of 3 per cent. allowed by the Secretary of War on \$9,873 51, the amount of the account after deducting the articles supplied by himself and his expenses, on neither of which is he entitled to a commission - 296 20

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\$10,610 34

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On the same day warrants for the balance in his favor, and for a further advance of \$3,000, were transmitted to him, with a letter from the accountant apprizing him of the settlement and of the reasons for the deductions. For some reason which does not appear, the amount of commission received and acknowledged by Mr. Fry seems to have been only \$274 65, instead of \$296 20. On the 15th September, 1811, Mr. Fry addressed a letter to the Secretary of War, urging the necessity of further advances of funds, complaining of the allowance of \$274 65 for his services, which would but little more than pay for stationery and clerk hire, and saying that, if nothing more was allowed, he must decline further acting in the business. To this letter the following answer was returned:

WAR DEPARTMENT, *September 21, 1811.*

SIR: Your letter of the 15th instant has been received. Three thousand dollars will be remitted to you by the Treasurer of the United States.

When the works in the harbor of Newport are completed, the subject of your compensation will be duly considered, and such allowance made to you as shall be deemed reasonable.

Respectfully, your obedient servant,

W. EUSTIS.

BENJ. FRY, Esq., *Newport, R. I.*

In addition to the \$3,000 here mentioned, a further advance of \$2,000 was made on May 26, 1812, making altogether \$8,000 advanced after the settlement of his accounts.

The Third Auditor states that these advances remained wholly unaccounted for, notwithstanding repeated calls for the rendition of his accounts and vouchers; and, on the 31st October, 1821, he was reported for suit, and a suit was commenced in the circuit court of the United States for the district of Rhode Island for the whole amount of \$8,000, not accounted for. On the 26th May, 1823, Mr. Fry's abstracts and vouchers were transmitted to the office of the Third Auditor, accompanied with an account current of that date, signed by him, in which he credited the United States with the \$8,000, and also \$274 65 received on account of compensation, and charged the amount of six abstracts for articles purchased, labor performed, pay of mechanics, and a payment on an order of Major Porter, amounting in all to - - - - - \$8,478 04

Expenses of a journey to Bristol, on business of the United States - - - - - 11 25

And "compensation for my services as agent of the United States fortifications in the harbor of Newport, including clerk and office hire, stationery, fire wood, and candles, for the use of my office, from March 26, 1810, to July 13, 1813, is 3 years 4 months and 4 days, at \$3 per day" - 3,657 00

\$12,146 29

The Third Auditor states that, "on the examination of the abstracts and vouchers thus transmitted, there were found to be several bills in his own name, unsupported by the original bills and receipts for the purchase of the articles charged, showing the cost of such articles, amounting together to - - - - - \$4,591 74

"And sundry sums charged on other vouchers, not duly receipted, amounting to - - - - - 128 96

\$4,720 70

"He was found to have made disbursements satisfactorily vouched for, not included in his account current, amounting to - - - - - \$259 87"

He was credited with this sum, and the amount of unexceptionable vouchers included in his account - - - 3,768 58

and commissions on these sums, at 3 per cent. - - - 120 25

\$4,149 30

Leaving a balance due from him to the United States of \$3,850 70 for the recovery of which the suit against him was prosecuted to trial.

It is stated by the district attorney that on the trial the court charged strongly in favor of the defendant, and that the jury certified that there was due to him from the United States the sum of \$2,474 60, they having allowed most of the disputed items of the account, and, as nearly as could be ascertained, \$1 50 per day, exclusive of Sundays. On the receipt of the report of the district attorney, stating these facts at the Treasury Department, in June, 1825, Mr. Fry was credited with the difference between the amount previously allowed and that charged to him, and his accounts closed on the books of the Third Auditor's office.

Upon this statement of facts, the committee would remark that, while disposed to pay great deference to the finding of a jury, especially under the charge of a court of such high character, they do not think there is any principle upon which the certificate in this case can be sustained. It is very evident that the compensation originally contemplated by both parties was a per centage upon the amount of disbursements. Mr. Fry knew that this had been the practice with his predecessor, and in this way made out his own account. There was no dispute between him and the Secretary as to the mode of estimating the compensation, but merely as to the rate of allowance. It is apparent, also, that, though desirous of getting more than 5 per cent., he would have been satisfied had that been allowed; and that his refusal to serve longer was occasioned by the reduction to 3 per cent. The letter of the Secretary promising a reasonable compensation must be construed in reference to these circumstances, and certainly affords no justification to Mr. Fry in making, or to the jury in allowing, a charge for compensation upon a principle totally different. The mode of compensating such agents by a per centum allowance appears to have been general at the time, and the nature of the duties were such as to make it a proper one. The rate was fixed in each instance by the Secretary of War, who is stated by the Third Auditor to have been influenced in deciding by the amount of the expenditure, giving the highest rate, which was 4 per cent., on the smallest sums: thus Captain Beall, who is mentioned by Mr. Fry as his authority for charging 5 per cent., received 4 per cent. on an expenditure of less than \$6,000; while to others, on disbursements amounting to \$16,800 and \$36,000, 3 and 2 per cent. respectively were allowed.

The object of Mr. Fry, in making a change in the mode of charging his compensation, is apparent, when we find that, by the seemingly moderate charge of \$3 per day, he actually charged commissions at the rate of about 20 per cent. upon his whole disbursements; and if we deduct the 3 per cent. allowed on the settlement of his first accounts, amounting to \$10,314, then his charge on the remaining \$8,749 is upwards of 38 per cent., although more than half the amount was for articles furnished by himself, on which it is reasonable to presume (as he did not produce the original bills) that he received at least a fair profit. If the jury allowed the whole amount of his account for disbursements, they must have allowed a compensation at the rate of more than 10 per cent. upon the whole amount disbursed; and if they rejected any portion of the account for disbursements, the compensation was larger by that amount. The committee do not think it proper to sanction such an allowance.

But it may be said that, even if not disposed to recognise the verdict as furnishing a rule by which the compensation of Mr. Fry is to be adjusted,



still his accounts for expenditures, exclusive of all compensation, exceed the amounts advanced to him between from \$400 and \$500, and that this balance, together with a reasonable compensation, should be allowed him. To this it may be answered that the accounting officers, by whom the accounts were examined, express the opinion that he has already received credit to the full amount that is required by justice and equity; and this opinion is corroborated, not only by the manner in which we find the charge for compensation swelled up to meet the claim of the Government, but also by the fact that Mr. Fry, who, when compelled by suit to bring forward his accounts, shows a considerable balance in his favor, withheld those accounts for some ten years, notwithstanding repeated calls to produce them. The committee therefore, believing that it is not a case requiring the interference of Congress, recommend that the prayer of the petition be rejected.

